U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 June 2003

CASE NUMBER: 2002-SWD-00004

In the Matter of:

ROBERT GAIN,
Complainant,

vs.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT,
Respondent.

Appearances:

For the Complainant:
Sangeeta Singal, Esq.

For the Respondent:
Thomas F. Kummer, Esq.
Lyssa M. Simonelli, Esq.

Before: Anne Beytin Torkington
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Robert Gain ("Gain" or "Complainant") brings this complaint against the Las Vegas Metropolitan Police Department ("LVMPD" or "Respondent") under the employee protection provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6971, and the implementing regulations found at 29 C.F.R. Parts 24 and 18. A three day trial was held in this case on January 13-15,

2003. The following exhibits have been admitted into evidence: Complainant's Exhibits ("CX") 1-16A,[1] p. 1-457; Respondent's Exhibits ("RX") 1-48, p.1-254;[2] Administrative Law Judge Exhibits ("ALJX") 1-6.[3]

On March 5, 2002, Complainant filed against Respondent an "Environmental Whistle Blower Discrimination" complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"), in San Francisco, California. CX-1, p.1-4. Complainant alleged he had been retaliated against for filing a complaint with Nevada state OSHES, the state equivalent of the federal OSHA. The complaint was accepted under Section 6791(a) of the Solid Waste Disposal Act, then dismissed without investigation based on lack of jurisdiction and untimeliness. The letter of dismissal dated April 9, 2002 was sent to Complainant and Respondent. A copy of the complaint was also sent to Respondent. The letter advised Complainant of his right to appeal the determination and to request a formal hearing on the record. Complainant timely exercised his appeal right on April 16, 2002. The complaint was docketed by the Office of Administrative Law Judges ("OALJ") on the same date, and assigned to this administrative law judge ("ALJ") on May 8, 2002. Thereafter, a Notice of Hearing and Pre-Trial Order were issued and served on May 13, 2002.

On May 15, 2002, the parties were convened by telephone conference, at which time they waived all statutory and regulatory deadlines and agreed to discovery deadlines and a new trial date. Complainant filed a second complaint with the federal OSHA on June 7, 2002, which was referred directly to OALJ for consolidation. The trial was re-scheduled and discovery was extended based on the additional complaint. The second complaint alleged "continued discrimination" for protected activity in that Complainant had been "relieved of duty" on May 25, 2002. That second complaint has been consolidated with this action.

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[1]CX-16A was admitted post-trial after I granted Complainant's motion to compel the complete records Respondent kept regarding Complainant. Only at trial was it evident that Respondent had not fully responded to Complainant's Request for Production for such records. After Respondent rendered such records to Complainant, Complainant determined that CX-16A contained those documents relevant to this proceeding and they are HEREBY ADMITTED to the record. In order to correct any prejudice engendered by the late submission of these records, the Court also ordered that Complainant would be permitted to re-open the hearing and call witnesses pertinent to CX-16A if he so desired. Complainant declined but moved to extend the length of the post-trial brief by 5 pages for a total of 30 pages, which motion was granted.

[2]CX-13 is missing page 312 and RX-10 is missing page 41. On May 12, 2003, a telephone conference was held at which both parties were informed of these incomplete exhibits and offered the opportunity to submit the missing pages; neither party did so.

[3]ALJX-1 is Complainant's pre-trial statement; ALJX-2 is Respondent's pre-trial statement; ALJX-3 is Respondent's Post-Hearing Brief; and, ALJX-4 is Complainant's post-hearing brief. ALJX-5 is the documents received by OALJ from OSHA and from Complainant in the process of referring his case. It was assembled post-hearing and the parties were served a copy with the option of objecting to its admission. As there was no objection, it is HEREBY ADMITTED to the record. ALJX-6 is Respondent's Reply Brief, received on May 27, 2003, and it is also admitted to the record.

Issues:

1. Was Complainant retaliated against for activity protected under the Solid Waste Disposal Act when he was:
   a. Transferred out of the Mounted Police Unit ("MPU"), on or around August 30, 2000,
      with sub-issues related to working conditions after the transfer;
   b. An Internal Affairs ("IAB") investigation was conducted on or around October 2000;
   c. An Internal Affairs investigation was conducted on or around May 2002?

2. Does this Court have jurisdiction over the two complaints filed:
   a. March 5, 2002 ("Complaint #1");
   b. June 7, 2002 ("Complaint #2")?

3. Was the March 5, 2002 complaint timely filed?

4. If the March 5, 2002 complaint was **not** timely filed, was the second complaint filed on June 7, 2002 also untimely based on it being a continuation of rather than separate from the first complaint?

Summary of Findings and Conclusions

Complainant did not timely file Complaint #1 but did timely file Complaint #2. I do not reach the issue of jurisdiction over Complaint #1 since it was untimely filed, but I find jurisdiction over Complaint #2. As Complaint #1 was untimely filed, I do not reach the issue of whether Complainant was retaliated against for protected activity prior to filing it (see, e.g., issue #1 above). I find that Complainant was not retaliated against for filing Complaint #2.

Background

Robert Gain joined the LVMPD in 1992. Tr.174.[4] After graduating from the academy, Gain transferred to the northeast area command to complete his field training and evaluation program. He was selected to join the newly created Mounted Police Unit ("MPU") and transferred there in November 1998. Tr.174.

Gain, along with his complainant-workers, engaged in internal complaints about the primitive working conditions at the MPU. On May 18, 2000, he filed an anonymous complaint with the state of Nevada Occupational Safety and Health Enforcement Section ("OSHES") which

[4]"Tr." refers to citations from the hearing transcript.

agency investigated the MPU. After Gain involuntarily transferred out of the MPU in early September 2000, he filed a discrimination complaint with OSHES on September 8, 2000, for which they found "merit." CX-6, p.83.

On October 10, 2000, Gain was removed from duty for a week, Tr.202, pending the outcome of an investigation into a charge of excessive force and failure to safeguard property based on a complaint from a person whom he had arrested. RX-30. The IAB, the unit assigned to investigate such complaints, sustained a charge of "neglect of duty." The sustained charge resulted in a verbal warning and in the "decision-making" portion (one of eight elements) of his performance evaluation being marked "unsatisfactory." RX-37. Although Gain could have been charged with burglary based on the arrestee's allegations, he was not. Tr.200; RX-27.

Gain was investigated by the IAB five times in 2001 resulting in no adverse action against him. Tr.262-263. Gain received a merit increase and a letter of appreciation from his supervisor, Juanita Goode during that time frame and he was rated at the high end of competency in each of eight categories in his March 2002 performance evaluation. Tr.278.

Gain filed his first federal environmental whistleblower complaint with the federal OSHA on March 5, 2002. On May 25, 2002, Gain was removed from duty pending an IAB investigation of excessive use of force. As a result of that investigation, Gain was suspended for 80 hours. Gain filed a second federal whistleblower complaint with the federal OSHA on June 7, 2002.

ANALYSIS

I. Timeliness

Complainant has filed two federal whistleblower complaints, one on March 5, 2002 ("Complaint #1"), and a second on June 7, 2002 ("Complaint #2"). Complaint #2 was filed within the statutory limit of 30 days as it pertained to an alleged act of retaliation for protected activity that occurred on May 25, 2002, when Complainant was relieved of duty pending an internal affairs investigation of the charge of excessive use of force.[5] However, Complaint #1 was filed more than seven months after the last alleged act of reprisal for protected activity and is therefore untimely.

Complaint #1 was filed on March 5, 2002, received on March 20, 2002, ALJX-5, and alleged that Complainant was retaliated against for engaging in activity protected under the federal whistleblower acts. The Complainant's federal whistleblower complaint was designated as

[5]I find also that Complaint #2 was not simply a continuation of Complaint #1, as Respondent argues in issue #4 above. As will be elucidated below in the "Jurisdiction" section, Complaint #2 has an independent jurisdictional basis.

a Solid Waste Disposal complaint[6] and was based on alleged protected activity which occurred when he filed two complaints with the state OSHES. Complainant filed the first complaint with OSHES on May 18, 2000. CX-2, p.6. The complaint specifies certain safety and health concerns: (1) no bathrooms or drinking water at the worksite; (2) inadequate lighting and unsafe wiring and extension cords; (3) unventilated storage container where employees dress; (4) unventilated hay barn where flammables are stored; (5) no permanent phone, no shade, no heat or air conditioning; (6) blowing dust and manure when conditions are windy with no respiratory or eye protection, resulting in respiratory problems; (7) lack of drainage, standing water, manure and raw sewage, breeding flies and insects; (8) no safety equipment such as night lights and stirrup reflectors; (9) 9 horses stalled on one-half acre, creating unsanitary conditions. There is no mention in this complaint about any effect on the environment. Complainant filed a second complaint with the state OSHES on September 8, 2000 alleging reprisal when he was transferred from the Mounted Police Unit for reporting the same workplace health and safety violations to that agency. CX-6, p.61-62.

Complainant's federal whistleblower complaint, filed on March 5, 2002, CX-1, alleges a number of adverse actions in reprisal for protected activity: (1) involuntary transfer from the Mounted Police Unit ("MPU") in September 2000 and written discipline on or about August 30, 2000, CX-4, p.40; (2) assignment to the "Plaza Desk" in the course of the transfer, having his days off changed temporarily, and having no choice over his permanent assignment; (3) relief of duty on October 10, 2000 pending burglary charges, with no disposition to date as to whether criminal charges would be filed; (4) sustained charge of neglect of duty issued on July 18, 2001, RX-30, p.104, oral form of discipline therefor, and June 1, 2001 performance rating issued July 11, 2001 pertaining to "Decision Making" checked "unsatisfactory." CX-11, p.223. The last alleged adverse action, the sustained charge of neglect of duty was issued on July 18, 2001, more than seven months before Complainant filed his March 5, 2002 whistleblower complaint with the federal OSHA. The SWD statute at 42 U.S.C. § 6971 (a) and (b) and the regulations at 29 C.F.R. § 24.3(b) require that a complaint be filed within thirty days of the alleged violation. That requirement has not been met and this complaint was not timely filed.

The Secretary of Labor and the Courts have developed two exceptions to the 30-day filing requirement: equitable tolling and continuing violation.

[6]The Office of Administrative Law Judges ("OALJ") was notified of the complaint on April 9, 2002, concurrent with its letter to Complainant dismissing his complaint. The letter from OSHA referred to the complaint under the SWD designation. Complainant appealed the dismissal to the OALJ on April 16, 2002 and stated his complaint was under "all whistle blowers protection acts." ALJX-5. The case was docketed at OALJ under the SWD. Although Complainant was represented by counsel, no attempt was made to broaden the scope to include other environmental whistleblower acts until the hearing had commenced. At that point, Respondent would have been prejudiced, and Complainant's attempt to broaden the scope of his complaint was denied.

A. *Equitable Tolling*

The 30-day time limit for filing a whistleblower complaint is in the nature of a statute of limitations and is subject to equitable tolling. *Lastre v. Veterans Administration Lakeside Medical Center*, 87-ERA-42 (Sec'y March 31, 1988); *School District of Allentown v. Marshall*. 657 F.2d 16, 19 (3rd Cir. 1981). The filing time may be tolled if: (1) the respondent misled the complainant concerning the cause of action, *Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995); (2) an extraordinary circumstance prevented a timely assertion (such as a stroke), *Central States, Southeast and Southwest Area Pension Fund v. Slotky*, 956 F.2d 1369, 1376 (7th Cir. 1992); or (3) the complainant timely raised the precise statutory claim but in the wrong forum. *Allentown* at 20.

Complainant is unable to show that he met any of the requirements for equitable tolling. No evidence was presented to show that Respondent concealed or misled Complainant in any way as to the adverse actions he alleges transpired. He was immediately aware that he had been retaliated against for whistleblowing activities related to his working conditions as he filed a complaint with the state OSHES agency on September 8, 2000, within nine days of the adverse action of written discipline on August 30, 2000. No evidence was presented to show that an extraordinary circumstance prevented a timely filing with the federal OSHA rather than the state OSHES, except for the Complainant's allegation that he called the federal OSHA and they told him that filing with the state agency was the same as filing with the federal one. Since Complainant appears to have alleged work-related health and safety complaints, it is not surprising that he would be so advised. For the same reason, Complainant's complaint to Nevada OSHES does not constitute the filing of an environmental whistleblower complaint in the wrong forum as his complaint in that forum related to occupational health and safety issues and not to community exposure or environmental concerns. Thus, Complainant did not raise the "precise statutory claim" in the wrong forum.

In summary, Complainant did not meet any of the equitable tolling pre-requisites to toll the 30-day statute of limitations.

B. *Continuing Violation*

A complainant may preserve the timeliness of a claim under the "continuing violation" theory if there is a course of related discriminatory conduct and the complaint is filed within 30 days of the last discriminatory act. *Egenrieder v. Metropolitan Edison Company*, 86-ERA-23 (Sec'y April 20, 1987). However, the continuing violation theory cannot resurrect alleged past retaliatory or discriminatory acts, the effects of which persist. *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977). According to the Supreme Court in *Ricks*, the critical question is whether any present *violation* exists. 449 U.S. at 258; *Evans*, 431 U.S. at 558.

The alleged retaliatory acts – written discipline and involuntary transfer in August-September 2000; change in working conditions incident to the transfer in or around the same time; relief of duty pending investigation of burglary and neglect of duty charges in October 2000; sustained neglect of duty charge, oral discipline, and unsatisfactory element in evaluation in or around July 18, 2001 – occur, at the latest, more than seven months prior to Complainant's March 5, 2002 whistleblower complaint filing. None of these adverse actions, whether termed a "continuing violation" or not fall within 30 days of the filing of Complainant's whistleblower complaint. Complainant argues that since he was never told he would *not* be charged with a felony for the alleged burglary which was the basis for relief of duty on October 10, 2000 and the sustained charge of neglect of duty issued on July 18, 2001, this is a "continuing violation" and remains an adverse action to date. I do not find this argument persuasive. I am unclear about what kind of "disposition" Complainant expects to dispel his ongoing fear. Not being charged with something is not an adverse action. At most, if at all, it is the *effect* of a past retaliatory act. The putative negative effects of an allegedly retaliatory act such as removal from duty or a charge of neglect of duty do not trigger the 30-day statute of limitations. Only the allegedly retaliatory acts themselves trigger that period. *Collins v. United Airlines, Inc.*, 514 F.2d 594 (9th Cir. 1975). Thus, Complainant "continuing violation" argument fails.

I must conclude that Complainant's March 5, 2002 whistleblower complaint was not timely filed as neither the equitable tolling nor the continuing violation exceptions have been proved.

II. Jurisdiction

As I have determined that Complaint #1 was not timely filed, I do not reach the issue of whether I have jurisdiction over it. However, Complainant's participation in the whistleblower process by filing Complaint #1 is *per se* protected activity as is his preparation to testify in the instant process before this Court. According to the SWD statute, 42 U.S.C. 6971(a):

> No person shall fire, or in any other way discriminate against . . . any employee . . . by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter . . . or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

Id.

The implementing regulations for whistleblower proceedings further define protection for participation in the federal whistleblower complaint process:

> (b) Any person is deemed to have violated the particular federal law and these regulations if such person intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee who has:
>
> (1) Commenced, or caused to be commenced, or is about to commence or cause to be commenced a proceeding under one of the federal statutes listed in § 24.1 or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
>
> (2) Testified or is about to testify in any such proceeding; or
>
> (3) Assisted or participated, or is about to assist or participate in any manner in such proceeding or in any other action to carry out the purposes of such Federal statute.

29 C.F.R. § 24.2(b) (1994). See also *McCuistion v. Tennessee Valley Authority*, 89-ERA-6, 5 (Sec'y Nov. 13, 1991); *Bassett v. Niagara Mohawk Power Company*, 86-ERA-2, 4 (Sec'y Sept. 28, 1993) (Complainant filed an earlier environmental whistleblower complaint and was protected for that activity).

Because Complainant filed Complaint #1, invoking the environmental whistleblower statutes, and because he was "about to testify in [a] . . . proceeding resulting from the . . . enforcement"[7] of the SWD,[8] I conclude that I have jurisdiction over Complaint #2.

III. Suspension

A. *Summary of Evidence*

Complainant's testimony

Complainant testified that after filing his first whistleblower complaint on March 5, 2002, Tr.211, he was relieved of duty for nine weeks on May 25, 2002, pending the outcome of an internal affairs ("IAB") investigation into an incident in which a prisoner was injured while in Complainant's custody on May 24, 2002. According to Complainant, he entered a jailhouse elevator that was about 6 feet square with three arrestees, one of whom was in distress and appeared ready to have a seizure. Tr.222. Gain joined another officer (Jeter) with two prisoners

[7] 42 U.S.C. § 6971(a).

[8] At the time of the alleged adverse action on May 25, 2002, which was the subject of Complaint #2, Respondent had already been served on May 13, 2002, with this Court's trial notice for Complaint #1.

on the elevator.[9] Complainant had removed his weapons and stored them as the officers were not allowed to carry arms on the elevator. Tr.223. Officer Jeter left, stating he would be back "in a minute." Complainant noticed that Jeter had told the prisoner "Don't spit on me again."[10] That prisoner ("McLaughlin"[11]) had his face to the wall of the elevator and his hands handcuffed behind him, but began turning, yelling and tensing his muscles. Tr.224. Complainant told McLaughlin to turn around and motioned with his fingers. Complainant grabbed McLaughlin's hair in an attempt to turn him around. McLaughlin jerked back with his head, bent Complainant's thumb back, chipping a bone and injuring a ligament. Complainant pulled McLaughlin to the floor. Complainant saw blood on the floor but was unsure how McLaughlin had injured himself. Tr.225. After the elevator reached the second floor, Complainant fetched the nurse who called an ambulance for the injured arrestee. McLaughlin later required stitches to a wound to his head. Complainant called his sergeant, his sergeant called his lieutenant and the incident was reported to IAB for investigation.

Complainant testified that he feared that McLaughlin was trying to give him HIV/AIDs or hepatitis. Complainant also testified that McLaughlin became violent in the ambulance going to the hospital, Tr.227-228, but IAB did not interview the officers in the ambulance. One of those officers, Jeremy Levy, testified at the hearing and confirmed Complainant's testimony. Tr.335.

Complainant's 80 hour suspension was the result of the IAB investigation sustaining the charge of excessive use of force and a prior sustained charge of excessive use of force. Complainant testified that he did have a previous sustained charge of excessive use of force, Tr.257, and that he could have purged his file of it, but did not. Tr.231. The second sustained use of force is considered a major use of force, and results in a minimum suspension of 50 hours and a maximum of 160 hours. Tr.258-259. Gain was aware that his immediate supervisor, Lt. Kevin Keehan, was the person who suspended him, and was in a chain of command different from that of the IAB. Tr.255.

Sgt. James Weiskopf's testimony

Sgt. Weiskopf was called by Respondent.

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[9]Officer Jeter testified at the hearing that he brought only one prisoner into the elevator. Tr.352.

[10]Officer Jeter testified that he warned Complainant that the prisoner was a spitter. Tr.353. He also testified that he did not have to use force on the prisoner. Tr.354.

[11]Weiskopf testified that "McLaughlin" was the injured prisoner's name. Tr.590.

Sgt. Weiskopf[12] was the line officer in charge of the IAB investigation into the excessive force charge. The investigation was initiated by Lt. Tavaras or Lt. Jett,[13] according to Sgt. Weiskopf. Tr.585. Weiskopf and Sgt. Larry Ross responded to the report by immediately going to the hospital where the injured prisoner was being treated. However, the prisoner was incoherent, so they left.

Sgt. Weiskopf did not know Complainant before this IAB investigation. Tr.584. He did not know Complainant had filed any sort of discrimination complaint against Respondent until a week before the hearing. Tr.584-585. Weiskopf and Ross interviewed a total of 11 people,[14] Tr.598, five of whom had witnessed the incident in real time on a monitor.[15] Two to three of the witnesses said McLaughlin was unconscious. In addition Weiskopf and Ross viewed a videotape of the incident, but it only recorded at 5 second intervals, and the critical 5 seconds during the time Complainant grabbed the prisoners hair and pulled him to the ground was not recorded. Weiskopf and Ross also interviewed Gain and Jeter. Weiskopf testified that he did not interview the officers who accompanied McLaughlin in the ambulance because this occurred after the fact of the incident in question, and thus McLaughlin's state of mind would not necessarily be the same in the ambulance as it was in the elevator. Tr.597.

Weiskopf testified that he learned McLaughlin was a spitter from Jeter. Weiskopf concluded that spitting did not occur, based on the witnesses testimony, including Gain's. Weiskopf testified that Gain told him that Jeter had told Gain McLaughlin had been spitting, but Gain did not state that McLaughlin had spit or attempted to spit at Gain. Tr.618. From viewing the videotape, Weiskopf concluded that McLaughlin turned his head and appeared to be exchanging words with Gain.[16] Tr.616. The next portion of the video shows Gain reaching for McLaughlin, and the next portion shows McLaughlin on the ground. Tr.617. Witnesses told Weiskopf that Gain was angered by McLaughlin's words, though nothing on the video (which had no sound) indicated this. Tr.620. Weiskopf testified that both officers Gain and Jeter stated that they summoned the nurse when the elevator reached the second floor. Tr.621. The nurse stated to Weiskopf that another individual, "Doyle," a correction officer, summoned him. Tr.622.

After Gain was interviewed, a second interview was scheduled to clarify statements he

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[12]Sgt. Weiskopf was promoted to "sergeant" on November 9, 2002. He was not yet promoted at the time of the IAB investigation at issue.

[13]On cross-examination, Weiskopf testified that Lt. Tavaras, the lieutenant for the Downtown Area Command, filed the complaint against Gain. Tr.604.

[14]The eleven witnesses included Gain, Jeter, and McLaughlin.

[15]Complainant questioned this fact because he believed the monitor room was too small to hold five people. Weiskopf testified that he did not go or look into the monitor room; Ross went into it. Tr.605.

[16]Weiskopf testified that he was unable to determine whether McLaughlin had turned his body toward Gain because the video camera's position did not show McLaughlin's body. Tr.616-617.

made that were believed to be conflicting. The second interview was cancelled in order to give Gain the benefit of the doubt since a finding of untruthfulness would warrant termination. Tr.625-628. At the time the issue of a second interview arose, Ross had retired, and Sgt. McCarthy was now in charge. He reported to Lt. Jett who reported to Commander Ault.

After the witnesses were interviewed, the tapes of the interviews were summarized; other detectives helped do this. Tr.600. Then, Weiskopf and Ross reviewed the summaries, and Ross made the ultimate findings after discussion with Weiskopf. Weiskopf reviewed the findings and agreed that excessive force had been used. Tr.601.

Weiskopf knew Ault, who was the Commander of IAB at the time of this investigation. Weiskopf did not discuss any investigation with Ault, including this one. Tr.603.

Testimony of Michael Snyder

Mr. Snyder was called by Respondent.

Mr. Snyder is the Director of Labor Relations for Respondent. He started his employment with Respondent in 1996. Labor Relations is engaged in the IAB process in any case of significance. Tr.658. Snyder reviews the dispositions[17] before they are issued.

Snyder testified that an officer is relieved of duty when an IAB investigation has started and termination is a possible outcome. This possibility arises when an officer is alleged to have committed a felony. If the IAB investigation determines that the officer did engage in a felony, he would be terminated. An excessive force charge would be an example of reason to relieve an officer of duty. The officer is paid during the pendency of the investigation. Snyder testified that he errs on the side of relieving the officer of duty because of the serious potential for liability. In addition, arbitrators expect that the officer will be relieved of duty as a justification of an action serious enough to result in termination. Snyder testified that nine weeks relief of duty (the length of the investigation at issue) is not unusual. Tr.665-667.

Deputy Chief Michael Ault's Testimony

Deputy Chief Ault was called by Respondent.

Ault was the Commander of the IAB from February to July 2002, after which a new department called the Office of Professional Standards was created which Ault headed, and a captain took charge of the IAB and reported directly to Ault. Ault was promoted to Deputy

[17]This is a single sheet of paper (see RX-40, p.126) which states that the charge is "sustained," "not sustained," etc.

Chief on January 6, 2003. Tr.409. Ault testified that he did know that Complainant was under investigation for use of force, but did not participate or assist in the investigation, nor did he assign the investigators, who were automatically assigned according to the district in which the subject of investigation worked. Tr.455. Ault testified that he did not contact either of the investigators or ask them to make a finding against Gain. Tr.456. He also testified that he did not tell anyone in the IAB about Gain's whistleblower complaint against the department. Tr.455-456. Ault testified that the IAB does not take an officer off of duty or discipline him; that is up to his chain of command. Tr.449-450. IAB investigates all use of force complaints, as of March 2002. Tr.451.

Testimony of Kerry Tritschler

Officer Tritschler was called by Complainant.

Officer Tritschler testified that he was an investigator at the IAB from December 2000 until November 2001. Tr.358. Sgt. Ross was his immediate supervisor. Tr.359-360. They worked together on investigations. They completed around 20 investigations without a problem. Tr.375-378. The next one concerned a charge of racial profiling. Tritschler believed the evidence showed that the charge should not be sustained. Tr.361. Ross changed Tritchler's finding and filed a report stating that the charge should be sustained. Tr.364-365. Subsequent to Tritchler's transfer out of the department, the case was re-opened and re-worked. Tr.366.

Sgt. Ross did not testify at the hearing. Sgt. Ross retired right after Complainant's IAB investigation was completed. Mr. Snyder stated that he had tried to locate him but failed.

Documentary Evidence

The IAB issued a "Disposition Report" sustaining the charge of excessive use of force. RX-40, p.126. Complainant's supervisor, Sgt. Skehan issued the "Adjudication of Complaint" and "Notice of Suspension." RX-40, p.127-129. The Adjudication of Complaint contains a synopsis of the results of the IAB investigation:

> The investigation into this matter and viewing of the videotape of the incident has determined that you were in the elevator with approximately 3-4 inmates. All of the inmates were handcuffed, and facing the rear wall of the elevator. The complainant was not only handcuffed with his hands behind his back, but was facing the wall and positioned between two other inmates which prevented him from completely turning around and facing off with you.
>
> The prisoner turns his head and engages in words with you. Obviously angered at the prisoner's words, you reached between two inmates, grabbed the prisoner by the hair and

pushed his face into the elevator wall. You immediately pulled him to the ground, causing his head to strike the door frame. This caused the prisoner to possibly fall unconscious, and receive a serious laceration to his head, which later required multiple stitches to close the wound. Upon the elevator doors opening, another officer noticed the

prisoner on the floor, with blood on the ground. This officer summoned the nurse, and it was determined the prisoner would be transported via ambulance to UMC due to the seriousness of his injuries.

The incident was captured on videotape. Although the videotape is not a continual play of events, but rather five second intervals, it is still clear that the prisoner's actions or lack thereof, did not warrant the excessive force used by you.

RX-40, p.128.

B. *Analysis*

Environmental whistleblower cases, in including the Solid Waste Disposal Act use the burdens of proof and production derived from Title VII cases, in particular, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *See Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987); *Kenneway v. Matlack, Inc.*, 88-STA-20 (Sec'y June 15, 1989). To establish a *prima facie* case, complainant must show that 1) he engaged in protected activity under the SWD; 2) he was subject to an adverse employment action; and, 3) there was a causal link between his protected activity and the adverse action of his employer. *See Moon*, 836 F.2d at 229; *See also, Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984).

Once the complainant has established a *prima facie* case, the burden of production shifts to the respondent which must articulate a legitimate, non-retaliatory reason for the adverse action. *Gunther v. County of Washington*, 623 F.2d 1303, 1314 (9th Cir. 1979), *aff'd*, 452 U.S. 161, 101 S.Ct. 352, 66 L.Ed.2d 313 (1981). The respondent need not prove the absence of retaliatory motive; it must simply produce evidence sufficient to dispel the inference of retaliation raised by the complainant. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78, 98 S.Ct. 2943, 2949-50, 57 L.Ed.2d 957 (1978).

Once the respondent meets its burden, the rebuttable presumption created by the complainant's *prima facie* showing "drops from the case." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.10, 101 S.Ct. 1089, 1095, n.10, 67 L.Ed.2d 207 (1981) and the issue of whether the complainant has made a *prima facie* case is no longer useful. "The [trier of fact] has before it all the evidence it needs to determine whether 'the defendant intentionally discriminated against the plaintiff.'" *USPS Bd. of Governors v. Aikens*, 460 U.S. 711,

715 (1983) (quoting *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1089). Regardless of the form of the evidentiary analysis, the ultimate burden of persuasion that the respondent engaged in unlawful reprisal remains at all times with the complainant. *Burdine*, 450 U.S. at 253, 101 S.Ct. 1089 at 1094, 67 L.Ed.2d 207 (1981).

The Administrative Review Board (ARB) holds that a case fully tried on the merits does not require an analysis of whether the complainant presented a *prima facie* case and whether the respondent rebutted that showing. *Adjiri v. Emory University*, 97-ERA-36 (ARB July 14, 1998); *Carroll v. Bechtel Power Corp.*, 91-ERA-46 (Sec'y Feb. 15, 1995), slip op. at 11 n.9, *aff'd sub nom. Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996):

> Once Respondent produces evidence in an attempt to show that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether the complainant presented a *prima facie* case. Instead the relevant inquiry is whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability.

Id. at 6 (citations omitted).

Accordingly, the Complainant must prove, by the preponderant evidence, that his removal from duty and ultimate 80 hour suspension was the result of retaliation for his protected activity. The Complainant has failed to carry his burden. Although he is able to show that he engaged in protected activity, and that Respondent had at least constructive notice of such activity, he is unable to show that the removal from duty and suspension was more likely than not based on his protected activity.

Complainant filed his first whistleblower complaint on March 25, 2002. On April 15, 2002, the Department of Labor (DOL) sent a Notice of Complaint to Respondent. I issued and served a Notice of Hearing in this case on May 13, 2002. Thus, Respondent was on notice of Complainant's SWD complaint shortly before he was removed from duty. Even though I have found that this initial complaint was not timely filed, the act of filing a whistleblower complaint is protected activity in itself. Complainants would not come forward to file legitimate complaints if they feared that reprisal might be the result. Thus, filing a complaint, whether meritorious or not, whether timely or not, is in itself protected activity.

However, Complainant has not shown that Respondent's legitimate, non-retaliatory reason for his removal from duty and suspension is a pretext for retaliation. It is undisputed that Complainant caused a prisoner in his custody to suffer a laceration to his head which resulted in possible unconsciousness, the need to be sent by ambulance to the emergency room, and stitches to the laceration. Mr. Snyder testified and I find credible that when a police officer engages in any activity, whether justified or not, that may involve excessive use of force, he or she is removed from duty pending the investigation of such act. Complainant has not shown that this policy or procedure was a pretext for retaliation against him. The evidence he provides for pretext is that

he was not removed from duty when accused in a prior incident. It is unclear why he was not removed from duty for the prior incident, but that simple inconsistency does not persuade me that such removal was not justified in this specific instance. Mr. Snyder stated officers in such cases were removed from duty for committing possible felonies, whether violent or not, due to liability problems. This explanation makes sense. I do not find it pretextual.

Complainant argues that the IAB investigation was rigged to make a "sustained" finding, and thus the suspension that followed was the product of retaliation for his protected activity. Complainant presents evidence to support this thesis: (1) Commander Ault, who had been the subject of Complainant's first whistleblower complaint, was in charge of the IAB at the time of the investigation, and his subordinates would have to follow his orders; (2) Sgt. Ross, who was in charge of the final report and sustained the finding that Complainant used excessive force, was corrupt in that he had changed the findings in a report that Officer Tritschler had authored and since Respondent did not produce Ross as a witness, the Court should make an adverse inference against him; (3) The video did not show Complainant doing anything wrong; (4) Complainant suffered a chipped bone and torn ligament in his left thumb which shows that the prisoner resisted and required control; (5) the prisoner was a "spitter" and was attempting to infect Complainant with HIV/AIDs or hepatitis; (6) IAB and Weiskopt's claim that there were 5 witnesses watching the incident in real time in the monitor room cannot be true as the monitor room was too small to hold 5 people; (7) Weiskopf did not interview the two officers who were in the ambulance after the incident who would have told him that the prisoner was very violent in the ambulance; (8) the summary of the IAB finding states that 3-4 prisoners were in the elevator, when there were actually 5; (8) Complainant was scheduled for a second interview with IAB to clarify inconsistencies which had the potential for termination for untruthfulness, which was cancelled.

It is not the ALJ's role to put herself in place of the employer and decide what she would do given the facts put before her. An employer's decision to discharge or discipline is not unlawful, even if based on mistaken conclusions about the facts; it is only unlawful if motivated by retaliation for protected activity. *Dysert v. Westinghouse Electric Corp.*, 86-ERA-39 (Sec'y Oct. 30, 1991). An employer has the right

> to interpret its rules as it chooses, and to make determinations as it sees fit under those rules . . . . Nor does the statute [Title VII] require the employer to have good cause for its decisions. The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or no reason at all, so long as its action is not a discriminatory [or retaliatory] reason.

Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (citations omitted).

I found Complainant's testimony credible, and I sympathized with him and his reasons for pulling the prisoner to the ground. I did not, however, talk to all of the witnesses and view the videotape. I found Sgt. Weiskopf a credible witness as well. Nothing about his testimony alerted me to manipulation of the evidence in the investigation in order to arrive at a particular outcome. Although Sgt. Ross did not testify, Weiskopf did and he stated under oath that he did not disagree with the findings and outcome in the IAB investigation at issue. As the critical 5 seconds when Complainant pulled the prisoner to the ground are not on the video, the witness interviews would be critical to a determination. The notes and interviews were not produced at trial. Complainant contends that it is Respondent's burden to produce that evidence; otherwise, the Court should find that Respondent has not met its *Burdine* burden of production.[18] Complainant fails to read the rest of *Burdine* or the other seminal Supreme Court case, *St. Mary's Honor Center*.[19] The burden of proof always remains with Complainant. Complainant served a request for productions of those documents in discovery. Respondent objected on the basis of confidentiality[20] and refused to produce the documents. Complainant did not file a Motion to Compel. Thus, the Court had no chance to intervene so these documents could be introduced as evidence. Complainant's attempt to place the burden on Respondent is not legally justified. Thus, Complainant is unable to show that the IAB investigation in question was tainted by retaliatory motive.

Nor was Complainant able to show that the 80 hour suspension was out of line. He himself testified that the length of the suspension was justified according to his understanding of the matrix used by the department. He also admitted that he had a prior sustained finding for use of excessive force in his personnel folder which he had neglected to purge and that it would have been taken into consideration in determining the length of the suspension. In addition, Complainant did not show that anyone involved in the IAB investigation and suspension, which involved at least 8 different officers up and down 2 chains of command acted for the reason of reprisal for Complainant's protected activity.

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[18]Complainant also argues that Respondent's defenses were mere articulations of good faith. The record does not support this contention. To sustain such an argument, Complainant would have to show an evidentiary void, i.e., virtually no explanation from Respondent in response to Complainant's *prima facie* case. See *Turner v. Fouche*, 396 U.S. 346, 361, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) (testimony of jury commissioners that they included or excluded no one based on race was insufficient as no explanation was proffered for the overwhelming percentage of Negroes disqualified). Here, Respondent gave an ample explanation for its actions: specific policies governing Complainant's investigation, an impartial process to adjudicate the complaint against him, reasonably specific and non-confidential testimony of the officer who conducted the investigation to show that an investigation was conducted, multiple parties interviewed, and a multi-level process was used to reach adjudication.

[19]509 U.S. 502, 113 S.Ct. 2742, holds that the trier of fact's rejection of an employer's asserted legitimate, nondiscriminatory reasons for its challenged actions does not entitle the employee to judgment as a matter of law. The defendant meets its burden of production in response to the complainant's *prima facie* case if the evidence produced, "*taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *Id*. at 509.

[20]See CX-13, p.319-320; CX-8, p.133, lines 11-17.

Conclusion

Complainant's Complaint #1 was untimely filed. Because of its untimeliness, I do not reach the issue of whether I have jurisdiction over Complaint #1. Complaint #2 was timely filed, and I have determined that I have jurisdiction over it. However, because Complainant did not show by the preponderant evidence that the removal from duty and suspension which resulted from the IAB investigation of May 2002 was the product of illegal reprisal for protected activity, I find that Complainant was not retaliated against.

RECOMMENDED ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I recommend the following Order:

1. Complainant shall take nothing.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge

San Francisco, California

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.